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In The

Supreme Court of the United States

October Term, 1995

CHARLES MARTIN EDGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

FRANCES L. ROBINSON
Counsel of Record
DAVIS ROBINSON & WHITE
Attorneys for Petitioner
15 Court Square, Room 960
Boston, Massachusetts 02108
(617) 723-7339

9005
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

61pp

QUESTIONS PRESENTED

1. Does due process require that the holding of this Court in *United States v. Zolin* applies to pre-trial proceedings before a grand jury where the defendant receives no notice or opportunity to assert the attorney-client privilege?

2. If the reasoning of *United States v. Zolin* is applicable to grand jury proceedings, and the procedures set forth in *Zolin* are not followed, what remedies are available to the defendant at trial?

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 82 F.3d 499 (1st Cir. 1996). A copy thereof appears in the Appendix hereto. The lower court's denial of the defendant's Motions for an Evidentiary Hearing, Discovery of Compliance with Local Rule 83.6(4)(B) of the Rules of the District Court, and Motion for Compliance with Procedures set forth in *United States v. Zolin* were not reported. (App. 30a, 32a, 37a).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 19, 1996, and the instant petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rule 13 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND RULES CITED

The United States constitutional provisions involved in this case are the Fifth and Sixth Amendments and are reproduced in the Appendix at page 38a. The rules involved are United States District Court Local Rule 83.6(4) (App. 39a) and Supreme Judicial Court Rules 3:07 and 3:08 (App. 40a-42a).

STATEMENT OF THE CASE

Charles Martin Edgar, the petitioner herein, was indicted by the grand jury for the District of Massachusetts on September 8, 1993. The indictment charged Edgar with: eleven violations of 18 U.S.C. § 1341 (Mail Fraud); thirteen violations of 18 U.S.C. § 1001 (False Statements to the Department of Labor); eleven violations of 18 U.S.C. § 152 (Bankruptcy Fraud) and one

violation of 18 U.S.C. § 408(a)(7)(B) (Use of a False Social Security Number).

Prior to trial, Edgar filed a Motion to Dismiss the Indictment for Illegal Use of the Testimony of Robert Koditek, Esq., a Motion In Limine for Compliance with the Procedures set forth in *United States v. Zolin* in Regard to the Testimony of Robert Koditek, Esq., and a Motion for Leave to File the Grand Jury Testimony of Robert Koditek Under Seal. The Motion for Leave to file the Grand Jury Testimony of Robert Koditek was allowed; the remaining Motions were denied. (App. 31a-33a).

Trial commenced on October 17, 1994. On October 21, 1994, Edgar filed a Motion for a Hearing as to Evidence Derived From the Illegal Use of the Testimony of Robert Koditek. That Motion was also denied. (Tr. 5-141) (App. 30a).

The court allowed Edgar's Motion for Judgment of Acquittal as to Counts 1 through 11 (mail fraud) and Counts 26 through 36 (bankruptcy fraud), as well as Count 37 (use of a false social security number).

The jury returned verdicts of guilty as to Counts 17, 18 and 19 which charged Edgar with making false statements to the Department of Labor in regard to a disability claim. The jury found him not guilty as to Count 24 which also charged false statements to the Department of Labor during a different time period. The jury found him guilty of Count 25 which charged him with mail fraud in connection with a claim for insurance benefits submitted by his agent, Robert Koditek and which is the subject of this petition. The jury was unable to reach a verdict as to Counts 12, 13, 14, 15, 16, 20, 21 and 22 and the petitioner's Motion for a Mistrial was allowed.

Edgar was sentenced to a term of imprisonment of one year and one day; he was also ordered to pay a fine of $5,000 and serve a term of supervised probation of two years. From the judgment of conviction Edgar appealed. The judgment of conviction was affirmed on April 19, 1996. Edgar petitions for certiorari relative only to his conviction on Count 25 charging him with the offense of mail fraud by sending a demand letter with allegedly false tax returns to Commercial Union Insurance Company through his attorney, Robert Koditek.

The pertinent facts are as follows:

In January of 1987, Edgar was involved in a motor vehicle accident in which the car he was driving was rear-ended by another driver. (Tr. 3-20). He retained attorney Robert Koditek to represent him in regard to the injuries and lost earning capacity he claimed to have sustained in the collision. (Tr. 5-145).

On February 8, 1987, in support of a claim for benefits under the other driver's policy, Edgar signed Linda Goodwin's name to a wage and salary verification which represented that his gross earnings in 1986 were $45,600. (Tr. 3-22, 3-58; Gov. Ex. 55). On October 12, 1988, Attorney Koditek sent a demand letter to Commercial Union Insurance Company indicating that Edgar had a net income of $60,000 from his CPA business in 1985 and 1986, and a loss of income in 1987. (Tr. 5-149, Ex. 54-A). In support of this claim, Koditek enclosed copies of tax returns for 1985, 1986 and 1987. Records of the United States Department of Revenue indicated that Edgar did not file returns in 1985 or 1986. (Tr. 5-154, Ex. 60-A, 60-B, 60-C, 60-D, 60-E).

During the grand jury investigation into Edgar's alleged false statement to the Department of Labor, the prosecutor making the presentment to the grand jury subpoenaed Koditek and inquired of him along several lines including Edgar's

mobility or back problems and his conduct in the office space which Koditek shared with Edgar (Grand Jury Testimony of Robert Koditek).[1]

The prosecutor also inquired of Koditek relative to Edgar's insurance claim in which he was represented by Koditek. When questioned about the substance of his conversations with Edgar, Koditek twice asserted the attorney-client privilege. The exchange was as follows:

> AUSA: Do you recall at some point making, as part of your claim to Commercial Union Insurance Company—submitting tax returns to commercial Union evidencing Mr. Edgar's income for the years prior to the accident?
>
> Koditek: I may have.
>
> AUSA: Well, what's your recollection, sir?
>
> Koditek: I don't recall.
>
> AUSA: Mr. Koditek, if you'd look at Exhibit 22 (the October 1988, demand letter) and if you could read that carefully to your self.
>
> Koditek: (Witness looking at document)
>
> AUSA: Have you looked at that document carefully, sir?

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1. Edgar filed the Grand Jury testimony of Koditek under seal at the time of his trial. The government later sought to have the testimony unsealed in order to respond to Edgar's appeal and the District Court allowed the government's Motion. Thus, the entire grand jury testimony of Koditek is part of the record of the case.

Koditek: Yes, I have.

AUSA: Does that refresh your recollection at all as to whether you submitted tax returns to Commercial Union Insurance Company as evidence of Mr. Edgar's wage-earning ability?

Koditek: It appears that I did.

AUSA: Do you recall any discussions with Mr. Edgar concerning those tax returns?

Koditek: Any discussions would be subject to the attorney/client privilege.

AUSA: Well, what I'm asking you is not what, in fact, was said, but I'm asking whether the subject of the tax returns ever came up.

Koditek: I would presume the subject came up.

AUSA: Did Mr. Edgar say to you at any time, in connection with your submission of those tax returns to Commercial Union Insurance Company, that those tax returns were not, in fact, identical to the ones filed with the Internal Revenue Service?

Koditek: Any conversation would be subject to the attorney/client privilege.

AUSA: Well, I think that in this particular

instance, sir, they would not. What I'm asking you is whether Mr. Edgar indicated to you, in substance or in fact, that he was submitting or having you submit to the Commercial Union Insurance Company tax returns which were not the same. That is to say that they were fraudulent tax returns that were not submitted to the Internal Revenue Service.

Koditek: No, he never said that to me.

AUSA: Was it your understanding, sir, that the tax returns that he submitted were, in fact, genuine tax returns as filed with the Internal Revenue Service?

Koditek: That would be my understanding.

Edgar was not notified of Koditek's appearance before the grand jury. No judicial determination of the application of the attorney client privilege was sought by the prosecution. Edgar was not provided with a transcript of Koditek's grand jury testimony until shortly before trial.

The grand jury indicted Edgar and charged, in Count 25, that *Edgar* had committed, *through his agent Koditek* mail fraud by sending the false demand letter and tax returns.

At hearing on Edgar's objections to Koditek's trial testimony and Edgar's Motions for Voir Dire and an Evidentiary hearing, the trial court and the prosecutor discussed the ways in which the agency allegation could be proven without seeking privileged materials. (Tr. 4-165-200). The trial judge was of the opinion that the documents themselves were insufficient to tie

Edgar to their false nature. The trial judge indicated that in order to present sufficient evidence of Edgar's knowledge of Koditek's actions, Koditek needed to authenticate the demand letter and that he needed to testify that Edgar supplied the tax returns with instructions to publish them to the insurance company. (Tr.4-170-189). The prosecutor stated that the demand letter sent by Koditek was the gravamen of the offense charged in Count 25. (Tr. 4-188). The trial judge ruled that the prosecutor could ask Koditek whether Edgar supplied the documents to him which were attached to the demand letter. Over Edgar's objection, the trial judge asked Koditek the following question during his trial testimony: "From whom did you received the information that was disclosed in that letter and was intended to be disclosed in that letter?" (Tr. 4-188). Koditek testified in response that he received the tax returns from Edgar that were submitted with the demand letter. The District Court ruled that this carefully tailored question avoided the privileged communications because he inquired only into from whom Koditek received the returns and if they were intended to be published. (Tr.4-196-197). The District Judge denied Edgar's Motions for a Hearing on the evidence derived from Koditek's grand jury testimony and for a voir dire on Koditek's trial testimony (Tr.5-141).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES V. ZOLIN* AND DECISIONS OF OTHER LOWER FEDERAL COURTS.

In *United States v. Zolin*, 491 U.S. 554 (1989), this Court set forth procedures to be utilized where an assertion of the attorney-client privilege is contested on the basis of the "crime-fraud" exception. In so doing, this Court noted:

> We have recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law. . . ."
>
> Courts long have viewed (the attorney-client) privilege as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Id. 491 U.S. 554, 562 citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Despite the clarity of the *Zolin* opinion which directs a two-level procedure: (1) the party opposing the assertion of the privilege must make a showing of a factual basis adequate to support a good-faith belief by a reasonable person and, (2) the Court may then conduct an *in camera* hearing on the application of the crime-fraud exception and the privilege, the court below found no error in denial of these procedures to Edgar because in their view, Koditek did not testify to privileged matters at trial.

This reasoning is in conflict with the Zolin opinion's clear recognition of the independent significance of the attorney-client privilege during pre-trial proceedings, and implies that privileged information may be obtained at pre-trial proceedings without judicial review of *any* kind as long as the trial testimony is then honed to non-privileged areas.

In addition to being in conflict with this Court's decision in *Zolin*, the lower court's decision, implicitly affirming the denial of Edgar's Motion for an Evidentiary Hearing on the Evidence Derived from Koditek's Grand Jury Testimony, is also in conflict

with the decision of the United States Court of Appeals for the Second Circuit which held that such a hearing is required. *United States v. Schwimmer,* 892 F.2d 237 (2d Cir. 1989). *See also United States v. Rogers,* 751 F.2d 1074 (9th Cir. 1985) holding that when the privilege is breached in the grand jury, the appropriate remedy is exclusion of privileged information and any derivative evidence at trial.

II.

THE REMEDIES FOR THE VIOLATION OF THE PETITIONER'S RIGHT TO CONFIDENTIALITY OF HIS CONVERSATIONS WITH HIS ATTORNEY FOUND ADEQUATE BY THE COURT BELOW ARE CONSTITUTIONALLY INSUFFICIENT.

The Local Rules for the District Court for the District of Massachusetts adopting Rules 3:07 and 3:08 of the Rules of the Supreme Judicial Court for the Commonwealth of Massachusetts provide that: (1) a prosecutor is not to summons an attorney and question the attorney about the subject matter of his representation of a client without prior judicial approval; (2) a client is entitled to notice that his attorney is revealing client confidences; (3) an attorney is not to reveal client confidences without notice to his client. (App. 39a).

It is therefor clear that the relevant rules and statutes governing the conduct of attorneys in the Commonwealth of Massachusetts created a property right in the confidentiality of Edgar's conversations with his attorney and that he was deprived of this right during the grand jury proceedings in this case. *See Parratt v. Taylor,* 451 U.S. 527 (1981) holding that property rights implicated by due process evolve from rules, statutes and common understandings (*overruled on other grounds Hudson v. Palmer,* 468 U.S. 517 (1984)).

The court below held that because Edgar could sue Koditek for malpractice, and because Koditek's trial testimony was limited to non-privileged areas, due process was served. The court did not address Edgar's argument that he was entitled to an evidentiary hearing on the question of whether Koditek's trial testimony was derived from the breach. (*See* Brief of Defendant, pp. 29-30).

The petitioner submits that whether Edgar had available tort remedies as to his attorney is wholly irrelevant as to the question of the admissibility of illegally gained evidence at his criminal trial. *See United States v. Leon,* 468 U.S. 897 at 906 (1984) stating specifically that exclusion of evidence wrongfully seized under the Fourth Amendment is "neither intended nor able to cure the invasion of the defendant's rights which he has already suffered" citing *United States v. Calandra,* 414 U.S. 338, 354 (1974). Instead, violations of the rights of a defendant during the course of the proceedings are to be dealt with *in those proceedings:*

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. . . .
>
> The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression.

United States v. Morrison, 449 U.S. 361, 366 (1981).

Here, Edgar was denied even a hearing to identify the "fruits of (the government's) transgression", and there has never been a hearing to determine the fruits of the transgression.

Instead, the court below held that Koditek's trial testimony did not involve privileged areas, without acknowledging that his testimony was derived from a violation of the attorney-client privilege. The record of this case demonstrates that because of Koditek's grand jury testimony, the government learned that the tax returns were given to Koditek by Edgar, that Koditek would not take sole responsibility for the representations in the demand letter, and that if asked the right non-privileged question, Koditek would give the response necessary to supply the agency element which the government charged Edgar with as a result of Koditek's grand jury testimony. The elimination of Koditek as the sole architect of the demand letter could not have been accomplished without his breach of the attorney-client privilege in the grand jury.

Due Process required that Edgar be given *at a minimum* a hearing to determine whether the government's case was in any way derived from a violation of the attorney-client privilege. *United States v. Schwimmer,* 892 F.2d 237 (2d Cir. 1989); *United States v. Rogers,* 751 F.2d 1074 (9th Cir. 1985).

III.

THE ISSUE PRESENTED IS ONE INVOLVING AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

While this Court has decided that dismissal of an indictment based upon incompetent or illegal evidence is not an appropriate remedy, *United States v. Morrison,* 449 U.S. 361 (1981); *United*

States v. Williams, 504 U.S. 36 (1992); *Bank of Nova Scotia v. United States*, 504 U.S. 36 (1988), it has also stated on numerous occasions that grand jury proceedings cannot override testimonial privileges such as the one at issue here:

> the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.

United States v. Calandra, 414 U.S. 338,346 (1974) (citations omitted).

See also United States v. Williams, supra, 504 U.S. 36, 112 S. Ct. 1735 at 1743 citing *Investigation of Hugle*, 754 F. 2d 863 (9th Cir. 1985).

The instant petition presents the question of what remedy, short of dismissal of the indictment, is appropriate for violations of testimonial privilege in the grand jury.

It is respectfully submitted that the question is one which is likely to occur in the aftermath of this Court's decisions in *Williams* and *Bank of Nova Scotia*, and that the difference in the approach taken by the courts below require this Court's determination of the issue.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that certiorari be granted and that the case be set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

FRANCES L. ROBINSON
Counsel of Record
DAVIS, ROBINSON & WHITE
Attorneys for Petitioner
15 Court Square, Room 960
Boston, Massachusetts 02108
(617)723-7339

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED APRIL 19, 1996

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-1190

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES MARTIN EDGAR,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *U.S. District Judge*]

Before

Selya, Stahl, and Lynch,

Circuit Judges.

Frances L. Robinson, with whom *Davis, Robinson & White* was on brief, for appellant.

James C. Rehnquist, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, was on brief, for the United States.

April 19, 1996

Appendix A

LYNCH, *Circuit Judge*. Charles Martin Edgar, formerly a U.S. Department of Commerce employee, was convicted of three counts of making false statements on his federal workers' compensation claims, and of one count of mail fraud arising from a false automobile accident claim to an insurer. He was acquitted on other charges, including bankruptcy fraud.[1] Edgar was sentenced to one year and one day plus two years of supervised release and was fined $5000.

His appeal argues that joinder of the bankrupcy fraud, workers' compensation fraud and insurance fraud was improper, as was the refusal to sever. He strongly asserts reversible error in the testimony of his civil-claim attorney before the grand jury which, he alleges, violated his attorney-client privilege. He also argues that the issue of materiality of the alleged false statements should have been submitted to the jury under the rule established later in *United States v. Gaudin,* 115 S. Ct. 2310 (1995), that denying him discovery was error, and that the evidence was insufficient to convict in any event. We affirm.

Two arguments merit close discussion. Edgar argues that it was improper and harmful for the government to have joined such disparate charges as workers' compensation fraud, auto insurance fraud and bankruptcy fraud into a single indictment, saying the common allegation of fraud is too weak a thread to sew them all together, and that the counts should have been severed. While the argument has some force, he was acquitted on the

---

1. The court granted Edgar's motions for acquittal on eleven counts of mail fraud based on the workers' compensation claims, on one count of using a false social security number in connection with his bankruptcy, and on eleven counts of bankruptcy fraud. The jury returned a verdict of not guilty on one count of making false statements to the Department of Labor and could not reach a verdict on nine other counts.

bankruptcy charge and we find no harm to him from its joinder with the other charges.

Edgar also argues that the government trampled on his attorney-client privilege and that this denied him due process. The government subpoenaed to the grand jury the lawyer who had represented Edgar on the automobile accident claim. The lawyer's initial declinations to answer questions about Edgar's communications on grounds of attorney-client privilege gave way in the face of continued questioning by the prosecutor. Edgar says he first learned of his attorney's grand jury testimony after he was indicted and before trial. While troubled by what happened, we find that there was no prejudice to Edgar at trial and therefore his remedy, if any, is not the vacating of his conviction.

Background

Edgar's checkered reporting on his employment status undergirds all counts on which he was convicted. In 1984 Edgar filed claims for compensation to the Office of Workers' Compensation Programs ("OWCP") of the Department of Labor based on back injuries suffered in a 1981 plane crash, allegedly work-related. The claim eventually ripened to a claim of total disability from 1987 on. The federal government paid him benefits, after objecting, for injury for the period from 1981 through 1986. It had balked at paying beyond 1986, but Edgar again won on appeal and he was paid to 1989. In May of 1991, in an effort to get payments for certain periods between 1989 and 1991, he submitted three forms CA-8 to the OWCP. These documents formed the basis for the counts of conviction. On other dates, he submitted other forms CA-8 as well as forms EN1032-0389 ("1032"). These forms are important to the OWCP in considering claims for continuing compensation.

Appendix A

The forms CA-8 required that certain information be provided if the claimant was working. The employment information is used by OWCP to determine a claimant's wage earning capacity, and thus the level of his benefits. Edgar was in fact working as a self-employed accountant during this period, but he did not provide the information required. Nor did he mention that he operated and managed a bar, which he also owned, from 1985 to 1990.[2] Instead, Edgar reported that he was neither self-employed nor employed by others. The forms include a warning that any "false statement, misrepresentation, [or] concealment of fact" could subject the submitter to a felony prosecution. Edgar says the forms were not material, as the department had already turned him down on this claim. But, based in part on those forms, he did receive continuing compensation for the post-1989 period. All told, he received more than $250,000 in benefits from the government.

In January 1987 Edgar was involved in an automobile accident and asserted he injured his back and could not work. Attorney Robert Koditek represented him in his claims for injury and lost income against the other driver's insurer and to his own insurance carrier, Commercial Union. Edgar submitted a form to his own insurer, purportedly executed by a company bookkeeper but in fact forged by Edgar, stating, as to lost income, that his accounting company paid him a yearly salary of $45,600. Attorney Koditek, representing Edgar, submitted a demand letter to Commercial Union on October 12, 1988, asserting that Edgar had been totally disabled as a result of the auto accident

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2. During the time for which he claimed disability, Edgar also attended law school. He eventually became licensed to practice law in Massachusetts, but was suspended following his conviction in this case. *In the Matter of Edgar*, No. 95-004BD (Bd. of Bar Overseers Jan. 20, 1995).

and demanding the policy limits be paid him. In support of Edgar's claim for damages for lost income, the letter attached "copies of Mr. Edgar's federal income tax returns for the years 1985, 1986, and 1987." Those signed returns showed income for 1985 of $62,392 and for 1986 of $61,876. But Edgar had never filed any tax return in either 1985 or 1986; so, the government charged, the representation was false. On January 16, 1989, Commercial Union settled Edgar's claim, paying him $75,000. Attorney Koditek testified at trial that Edgar had supplied him with the copies of the tax returns given to Commercial Union to support his claim.

Joinder and Denial of Motion for Severance

The 37 count indictment returned against Edgar charged three fraudulent schemes. The first 24 counts charged Edgar with mail fraud, alleging that Edgar had wrongfully obtained money through the mails (specifically, the disability checks) and had made false statements to the Department of Labor. These counts were premised on Edgar's falsely representing his employment and earning capacity in connection with his disability claim from 1989 to 1992. Another count involved Edgar's submission, through Attorney Koditek, of false documents and a demand letter making false statements to his automobile insurer in 1988. The remaining twelve counts charged Edgar with filing documents containing false statements in 1991 in connection with Edgar's bankruptcy. The scheme alleged was that Edgar filed a bankruptcy petition in California, falsely representing California was his state of domicile, listing a false social security number and concealing assets and income from his former wife and other creditors.

Edgar argues that the counts charging these three schemes should not have been joined because they were insufficiently

similar. He argues that the single common characteristic, misrepresentation of material facts, was not enough to satisfy the standards for joinder. He also argues that evidence of one scheme would not be admissible in a trial on another scheme and thus the jury could infer from the evidence of one fraud that Edgar was predisposed to engage in another fraud.

Edgar's argument that there was an improper joinder of claims against him in the indictment, which the district court refused to undo, raises two concerns. Edgar argues first that there was not sufficient similarity among the counts of conviction to permit joinder. Second, he postulates a harmful spillover effect from all of the counts, even those on which he was acquitted, which prejudiced him and led to his conviction. He also claims that, apart from the initial wrongful joinder, the district court should have allowed his motion for severance.

The standard for joinder is set forth in Rule 8(a), Fed. R. Crim. P., which provides:

> Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character. . . .

"Similar" does not mean "identical," *United States v. Werner,* 620 F.2d 922, 928 (2d Cir. 1980), and similarity must be analyzed in terms of how the government saw its case at the time of indictment. *United States v. Natanel,* 938 F.2d 302, 306 (1st Cir. 1991), *cert. denied,* 502 U.S. 1079 (1992). As Judge Friendly commented in *Werner,* under the mandate of the Speedy Trial Act, joinder serves the purposes of economy of resources. 620 F.2d at 928. Denial of a motion for relief from misjoinder is reviewed de novo. *United States v. Chambers,* 964 F.2d 1250 (1st

Cir. 1992). Further, a misjoinder is not reversible if it was harmless. *United States v. Lane*, 474 U.S. 438, 444-50 (1986); *United States v. Randazzo*, __ F.3d __, __, No. 95-1489, slip op. at 6 (1st Cir. Apr. 8, 1996).

Edgar also argues that even if joinder was proper, his motion to sever the different schemes should have been granted. Under Rule 14, Fed. R. Crim. P., "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses . . . , the court may order . . . separate trials of counts." The denial of a motion for severance is reviewed for abuse of discretion, and must be affirmed unless there is a "strong showing of evident prejudice." *United States v. O'Bryant*, 998 F.2d 21, 25 (1st Cir. 1993).

In determining whether counts are properly joined, this court considers such factors as "whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct occurred." *United States v. Taylor*, 54 F.3d 967, 973 (1st Cir. 1995) (internal citations omitted).[3] The government argues that the test is satisfied because the workers' compensation fraud and the automobile accident fraud involved

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3. An earlier case in this circuit applied an arguably more stringent standard for the government to join two or more offenses under Rule 8(a). *See United States v. Yefsky*, 994 F.2d 885, 895 (1st Cir. 1993) (finding proper joinder where there was " 'substantial identity of facts or participants' " underlying two charged schemes, quoting *United States v. Levine*, 546 F.2d 658, 662 (5th Cir. 1977)). Given that Edgar used the same basic mechanism, misrepresenting earning capacity in seeking compensation lost due to a back injury, in both the workers' compensation and auto insurance fraud, we believe that joinder of the counts underlying these schemes would have been proper even under the test applied in *Yefsky*. Given our disposition of this issue, we need not decide whether *Yefsky* set a more rigid test for joinder of offenses than the language of Rule 8(a) warrants.

the same *modus operandi* of claimed total disability following an asserted injury to the back, an asserted loss of income, the submission of false official forms, and the misrepresentation of other employment in order to rake in large sums. As to timing, the workers' compensation fraud overlapped the auto insurance fraud. Witnesses and testimony would also overlap. Evidence as to the auto accident fraud would be used on the claimed disability from a back injury from the plane crash, and to establish that Edgar misrepresented his earnings and earning capacity. We believe there were sufficient similarities between the workers' compensation and insurance fraud schemes to permit joinder of those counts.

However, like the district court, we are disturbed by the joinder of the bankruptcy fraud.[4] We discern no "common scheme or plan." *See Randazzo*, __ F.3d at __, No. 95-1489, slip op. at 5. The bankruptcy fraud charges, relating to events in 1991, were brought under different statutes and the supposed victim was Edgar's ex-wife (and possibly other unspecified creditors). The location was different. The bankruptcy filings were all with the court in California, while the other frauds took place primarily in Massachusetts. The modes of operation were different. In the workers' compensation and automobile insurance frauds, Edgar asserted an injury to his back, which resulted in the loss of earnings. The alleged bankruptcy fraud did not involve an attempt to obtain payment for an injury. Rather, it was allegedly an attempt to avoid obligations to his ex-wife, with

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4. The district judge, in granting the motion for acquittal on the bankruptcy charges after the government had presented its case, noted the potential problems with the joinder of the bankruptcy fraud. He said, "[T]his type of indictment looks like you are piling it on. . . . " He also thought that "th[e] bankruptcy case was transferred here to boost up the other false statement cases" and that there was an "unusual" number of schemes alleged.

whom he had an acrimonious relationship, and to force her to press her claim in an inconvenient forum.

Edgar claims he was prejudiced because the evidence for each scheme had a harmful spillover effect, and the jury convicted him not because of specific evidence showing his guilt, but because of its perception that he was a dishonest man.[5] Specifically, Edgar posits that the jury heard evidence that (1) he collected $75,000 in settlement for the auto insurance claim; (2) he had an extremely acrimonious divorce; (3) he filed for bankruptcy in California and made false statements that he resided there; (4) he has owned various properties and has established trusts at different times; (5) he filed false information in the bankruptcy court regarding his assets and social security number.

Even assuming the bankruptcy count was improperly joined, any error was harmless. It did not result in "actual prejudice" because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Lane*, 474 U.S. at 449 (internal quotations omitted); *see also O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995). Edgar was acquitted by the court of the bankruptcy fraud and of several counts of mail fraud in the workers' compensation scheme before the matter went to the jury. Of the remaining thirteen workers' compensation counts, the jury proved itself capable of making distinctions: it acquitted Edgar of one, could not reach a verdict on nine and convicted on three. The jury thus showed itself

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5. Edgar also claims that, had the schemes been severed, he may have testified for one, but not another. Edgar does not expand upon this claim of prejudice, and an "unexplicated assertion" that he would have testified at one trial is not enough to establish prejudicial joinder. *United States v. Werner*, 620 F.2d 922, 930 (2d Cir. 1980).

clearly capable of discriminating among the evidence applicable to each count, even within the workers' compensation fraud, thus reducing the risk of any prejudice from evidence on the bankruptcy count. *See United States v. Stackpole*, 811 F.2d 689, 694 (1st Cir. 1987) (jury's acquittal on one of several counts suggests jury not confused by joinder). Moreover, the court gave appropriate limiting instructions.[6] *See Chambers*, 964 F.2d at 1251; *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989) (misjoinder can be rendered harmless by proper limiting instruction); *cf. Lane*, 474 U.S. at 450 (analyzing joinder of defendants under Fed. R. Crim. P. 8(b)[7]). The exhibits relating solely to the bankruptcy fraud were struck.

Some of the evidence as to the bankruptcy and insurance schemes was admissible as to the workers' compensation scheme, thus resulting in no prejudice. *See Stackpole*, 811 F.2d at 694; *cf. Lane*, 474 U.S. at 450 (analyzing joinder of defendants under Rule 8(b)). Any statements that Edgar filed with the

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6. The court instructed the jurors that they should "put out of [their] minds any reference or evidence concerning Counts 1 through 11 charging mail fraud and Counts 26 through 36 charging bankruptcy fraud and the use of a false Social Security number, because [the court has] ruled, as a matter of law, that the government has failed to prove all of the necessary elements of each of those charges." The court further instructed, "You must decide the remaining charges as if those charges that I have removed from your consideration, mail fraud and bankruptcy fraud, were never made and as if no evidence was submitted in support of those charges. You must limit your consideration. . . . And you must determine if the government has sustained its burden of proof beyond a reasonable doubt, excluding all references to or evidence concerning Counts 1 through 11 and 26 through 37."

7. Fed. R. Crim. P. 8(b) allows for the joinder of two or more defendants if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

bankruptcy court stating his income for the years encompassed by the workers' compensation fraud would have been admissible on the latter issue. The statements made to the insurance company in connection with the insurance fraud were admissible on the workers' compensation issue, particularly as they related to Edgar's back injury and his loss of earnings. Finally, there was substantial independent evidence on the counts of conviction. The fraud against the insurance company and the three counts of submitting falsified documents to the Department of Labor were supported by evidence unrelated to the bankruptcy.

Thus, Edgar cannot meet his burden of showing prejudice on the denial of the motion for severance as to any of the counts. Garden-variety arguments of spillover — such as if the jury found defendant guilty of A, that alone would lead to the conclusion that he was guilty of B — without more, are insufficient to require severance. *Taylor*, 54 F.3d at 973. Appellants must demonstrate actual prejudice. That is a particularly difficult burden for Edgar to meet, because the spillover from his acquittal on the bankruptcy count and certain of the workers' compensation counts could just as easily be posited to have worked to his benefit. The law of severance and joinder is a stricter master than Edgar's claimed error. *See Natanel*, 938 F.2d at 307-08.

The Grand Jury Testimony

On June 1, 1993, Attorney Koditek testified under subpoena before the grand jury. Edgar says that neither the government nor Attorney Koditek notified him that Koditek would testify under subpoena.

Edgar complains that he did not learn of the grand jury

testimony of his civil-claim lawyer until after he was indicted. Even then, the prosecution denied Edgar's requests for a copy of Attorney Koditek's testimony. Ten days prior to trial, the new prosecutor assigned to the case appropriately provided the transcript to the defendant. This is what the transcript[8] showed:

AUSA: Do you recall at some point making, as part of your claim to Commercial Union Insurance Company — submitting tax returns to commercial Union evidencing Mr. Edgar's income for the years prior to the accident?

KODITEK: I may have.

AUSA: Well, what's your recollection, sir?

KODITEK: I don't recall.

AUSA: Mr. Koditek, if you'd look at Exhibit 22 [the October 12, 1988, demand letter] and if you could read that carefully to yourself.

KODITEK: (Witness looking at document)

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8. The district court allowed the government's motion to disclose certain portions of Attorney Koditek's grand jury testimony for purposes of responding to this appeal.

AUSA: Have you looked at that document carefully, sir?

KODITEK: Yes, I have.

AUSA: Does that refresh your recollection at all as to whether you submitted tax returns to Commercial Union Insurance Company as evidence of Mr. Edgar's waive-earning ability?

KODITEK: It appears that I did.

AUSA: Do you recall any discussions with Mr. Edgar concerning those tax returns?

KODITEK: Any discussions would be subject to the attorney/client privilege.

AUSA: Well, what I'm asking you is not what, in fact, was said, but I'm asking whether the subject of the tax returns ever came up.

KODITEK: I would presume the subject came up.

AUSA: Did Mr. Edgar say to you at any time, in connection with your submission of those tax returns to Commercial Union

Insurance Company, that those tax returns were not, in fact, identical to the ones filed with the Internal Revenue Service?

KODITEK: Any conversation would be subject to the attorney/client privilege.

AUSA: Well, I think that in this particular instance, sir, they would not. What I'm asking you is whether Mr. Edgar indicated to you, in substance or in fact, that he was submitting or having you submit to the Commercial Union Insurance Company tax returns which were not the same. That is to say that they were fraudulent tax returns that were not submitted to the Internal Revenue Service.

KODITEK: No, he never said that to me.

AUSA: Was it your understanding, sir, that the tax returns that he submitted were, in fact, genuine tax returns as filed with the Internal Revenue Service?

KODITEK: That would be my understanding.

Appendix A

What is clear is that Attorney Koditek was questioned about the substance of his conversations with his client, that he asserted attorney-client privilege twice, that the prosecutor responded that the matter was not covered by privilege and that Koditek then answered. This was apparently done without the client, Edgar, being aware of the testimony. Nor was there any judicial review of whether the testimony was indeed privileged.

At trial Edgar did object on grounds of attorney-client privilege to any testimony from Attorney Koditek. The court rejected the privilege claim. Attorney Koditek testified that he represented Edgar in connection with the Commercial Union claim, that he wrote two letters to Commercial Union in connection with the claim, and that the tax returns were enclosed with one of the letters. Attorney Koditek authenticated the letters, but declined to answer on grounds of privilege the question of who gave him the material (including the tax returns) to be enclosed with the demand letter to the insurer. The district court ruled that because the tax returns were disclosed to the insurance company, the fact that Edgar gave the returns to Koditek was not privileged. Attorney Koditek answered that he received the tax returns from Mr. Edgar. Edgar chose not to cross-examine on this point and never asserted a defense of advice of counsel or that the attorney's actions were not authorized. At trial, Attorney Koditek did not testify, as he did to the grand jury, about whether Edgar had ever told him that the tax returns submitted to Commercial Union had not been submitted to the IRS. The government did put on independent evidence that these returns were never filed with the IRS.

Edgar filed several motions regarding his attorney's testimony. He argued a fruit-of-the-poisonous-tree theory that Attorney Koditek's testimony before the grand jury was illegal

and so the indictment should be dismissed or evidence should be suppressed. There is precedent for an argument that a court may quash an indictment based upon evidence directly obtained from or derived from breach of the attorney-client privilege. *See United States v. Omni International Corp.*, 634 F. Supp. 1414, 1421 (D. Md. 1986) (but doubting that dismissal was an appropriate remedy under *United States v. Morrison*, 449 U.S. 361 (1981)); *People v. Fentress*, 425 N.Y.S.2d 485 (Dutchess Co. Ct. 1980); *Baltes v. Doe I*, 57 U.S.L.W. 2268 (Fla. Cir. Ct. 1988). Some federal courts have held that if the prosecutor induces the breach, suppression of evidence derived from the breach is the appropriate remedy, unless prejudice would remain, in which case the indictment may be dismissed. *See, e.g., United States v. Rogers*, 751 F.2d 1074, 1079 (9th Cir. 1985) (no dismissal when any prejudice to defendant could be neutralized by excluding at trial confidential communications wrongfully obtained from defendant's former attorney). But "[w]hen a federal court uses its supervisory power to dismiss an indictment it directly encroaches upon the fundamental role of the grand jury. That power is appropriately reserved, therefore, for extremely limited circumstances." *Whitehouse v. United States Dist. Ct.*, 53 F.3d 1349, 1359 (1st Cir. 1995) (internal citation omitted). Indeed, the Supreme Court has said that prejudice is required to dismiss an indictment for prosecutorial misconduct. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988). Edgar also sought discovery as to whether the proper procedures were followed to subpoena Attorney Koditek. And, he argued that the government had failed to follow the procedures in *United States v. Zolin*, 491 U.S. 554 (1989). Those motions were all denied.

Attorney-Client Privilege and Due Process Arguments

Edgar argues on appeal that the questioning of Attorney

Koditek before the grand jury violated his rights to due process and to the assistance of counsel. We will assume, *arguendo*, that Edgar did not waive his rights under the attorney-client privilege and that those rights were violated by Attorney Koditek's testimony before the grand jury. But even with those assumptions it does not follow that the appropriate remedy is to vacate his conviction.

Contrary to Edgar's arguments, no Sixth Amendment right to counsel is even implicated here, as the lawyer called to the grand jury was not criminal defense counsel. *See, e.g., Rogers,* 751 F.2d at 1077-78. Nonetheless, we are troubled by what happened and seek guidance in case law discussing the district court's adoption of Rule 3:08 of the Rules of the Supreme Judicial Court of Massachusetts, and in the teachings of *United States v. Zolin,* 491 U.S. 554 (1989).

A long simmering dispute in Massachusetts over prosecutors serving grand jury subpoenas on counsel resulted in the affirmance by this court, equally divided en banc, of a district court opinion that approved the Local Rule that adopted the disciplinary rules of the Supreme Judicial Court, particularly S.J.C. Rule 3:08, Prosecutorial Function 15 ("PF 15"). *See United States v. Klubock,* 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court) ("*Klubock II*") (plaintiff prosecutors sought a declaratory judgment against the Board of Bar Overseers that the rule was invalid as applied to federal prosecutors), *aff'g* 639 F. Supp. 117 (D. Mass. 1986). The net effect is that federal prosecutors in Massachusetts must comply with PF 15, which provides:

> It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury

> without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.

S.J.C. Rule 3:08, PF 15.[9]

The prosecutor here argues that PF 15 does not literally apply as Edgar *was* represented in the past by Attorney Koditek, but was not represented by him at the time of the subpoena, as the language of PF 15 requires. Nonetheless, the prosecution represented to the district court that it had complied with PF 15 and had obtained prior judicial approval to serve the subpoena. But, as Edgar points out, the record is devoid of proof on this point.

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9. The American Bar Association has recommended an even stricter procedure for attorney subpoenas:

> The prosecutor in a criminal case shall ... not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Model Rule of Professional Conduct Rule 3.8(f)(1990). The ABA Model Rule, unlike PF 15, makes no distinction between past and present client-attorney relationships and requires an adversarial proceeding before the subpoena may issue.

Appendix A

The subpoena here did not go to the target's criminal defense counsel and so does not raise the issues of potential abuse specific to that situation. *See Whitehouse*, 53 F.3d at 1354. But Edgar and Attorney Koditek were at least potentially placed in the hypothetical situation described in the panel opinion vacated by Klubock II[10]:

> The serving of a subpoena under such circumstances will immediately drive a chilling wedge between the attorney/witness and his client. This wedge is the natural consequence of several underlying factors created by this anomalous situation. Most obvious is the fact that the client is uncertain at best, and suspicious at worst, that his legitimate trust in his attorney may be subject to betrayal. And because the subpoenaed attorney/witness may himself feel intimidated, this may in fact take place if there is not even minimal ethical control regulating the subpoenaing of an attorney/witness to seek evidence against his client.
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> More subtle, but perhaps more important in terms of the ethical setting within which PF

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10. The court in *Klubock II* produced for publication the vacated panel opinion, *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1987) ("*Klubock I*"), because the members of the en banc court referred to the panel opinion. *Klubock II*, 832 F.2d at 665. The opinion in *Klubock II* affirming the district court did refer to the portions of *Klubock I* quoted here, *id.* at 667, although neither *Klubock I* nor *Klubock II* is controlling precedent, *Whitehouse*, 53 F.3d at 1354.

> 15 is framed, is the immediate conflict of interests created between the attorney/witness and his client by the serving of a subpoena in the context of what is contemplated by PF 15. As a witness, the attorney/witness has separate legal and practical interests apart from those of his client. These interests may or may not coincide with those of the attorney/witness and his client. The mere possibility of such a conflict is sufficient to create a problem. A minimal overview by an impartial observer, as is provided by PF 15, can go far in preventing the creation of these ethical conflicts between the attorney/witness and his client.

United States v. Klubock, 832 F.2d 649, 652-53 (1st Cir. 1987) (footnote omitted) ("*Klubock I*"). We believe these considerations apply to the relationships with former counsel as well as with present counsel.

There may be an implicit threat to the attorney called to testify about a client to the grand jury that the attorney will become a target himself[11] should the prosecutor think he knowingly participated in the fraud. This is particularly so where the prosecution asserts that privilege must give way to the crime-fraud exception. The lawyer may be tempted to reveal privileged

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11. Indeed, at trial Attorney Koditek indicated an intent to assert the right under the Fifth Amendment not to incriminate himself if called to testify. By the time of Attorney Koditek's trial testimony, he had been granted immunity by the prosecution.

conversations in order to avoid becoming a target himself.[12] Ideally, counsel receiving a subpoena will give notice to a client and consistently assert the privilege on behalf of a client. Ideally, a prosecutor faced with an assertion of privilege by an attorney witness will seek a judicial determination of whether the privilege is valid. But we do not live in an ideal world. *See* Jerome Frank, *If Men Were Angels* (1942). We are loath to say the prosecutor here crossed over the line. But we are equally loath to say, as the government urges, that there is no line and there is never a remedy.[13]

The first line of defense to protect Edgar's privilege lay in the hands of his lawyer. A lawyer has an obligation not to reveal client confidences. S.J.C. Rule 3:07, Code of Prof. Resp., DR 4-101. A lawyer also has an obligation to assert privilege on behalf of a client. *Id.; see also In re Impounded Case (Law Firm),* 879 F.2d 1211, 1213 (3d Cir. 1989). Generally, an attorney has an obligation to assert the privilege on behalf of the client and not to

12. While an attorney may, under the self-defense doctrine set forth in S.J.C. Rule 3:07, Code of Prof. Resp., DR 4-101(C)(4), reveal information without prior notice to the client, the doctrine does not apply unless there is an "accusation" of wrongful conduct. We do not think the prosecutor here made an "accusation" against counsel that would have triggered this provision.

13. Indeed, other courts have concluded that there are limits to how far government investigators may go in attempting to induce a breach of the attorney-client privilege. In *Omni*, the district court chastised the government for interviewing an attorney's secretary. 634 F. Supp. at 1431, 1439. *See also United States v. Valencia,* 541 F.2d 618 (6th Cir. 1976) (improper for government to pay attorney's secretary for information about the attorney's clients). But, attorneys are themselves responsible for protecting the client by asserting the privilege when it applies. *See, e.g., United States v. Rasheed,* 663 F.2d 843, 854 (9th Cir. 1981), *cert. denied,* 454 U.S. 1157 (1982); *Omni,* 634 F. Supp. at 1422-23, 1431.

disclose confidential information until there is a judicial determination that there is no privilege. *ABA/BNA Lawyers Manual on Professional Conduct* 55:1307-08 (1989). Even if there is an assertion that there is no privilege because the crime-fraud exception applies, the attorney is required to give notice to the client. S.J.C. Rule 3:07, Code of Prof. Resp., DR 7-102(B)(1). If the attorney violates these duties, he is at risk at least of a malpractice suit and of professional discipline.

Concomitantly, a prosecutor has certain obligations beyond zealous representation of the government when the prosecutor interrogates witnesses before the grand jury. For example, if a witness invokes the privilege against self-incrimination, the prosecutor should cease questioning as to the particular subject to which the privilege was addressed. *United States v. Mandujano,* 425 U.S. 564, 581 (1976). *But see United States v. Benjamin,* 852 F.2d 413, 420 (9th Cir. 1988) (testing validity of reliance on privilege not prosecutorial misconduct unless prosecutor harangued witness or improperly commented on assertion of privilege), *vacated on other grounds,* 490 U.S. 1043 (1989). Thus, the second line of defense is that the prosecutor will not harangue a witness, but will promptly bring the issue to a court.

The third line of defense is that there will ultimately be a disinterested judicial determination of the issue.[14] In *United States v. Zolin,* 491 U.S. 554 (1989), the Supreme Court set forth the procedure for obtaining judicial review when the attorney-client privilege is consistently asserted and the government

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14. The judicial protection of rights inherent in PF 15 does not resolve this situation. That a judge has *ex parte* authorized issuance of a subpoena to counsel does not mean that a determination has been made that any assertion of privilege before the grand jury has been decided in the prosecution's favor.

opposes the privilege. *Id.* at 572. The government may obtain in camera review of the information alleged to be privileged, at the discretion of the court, upon a " 'showing of a factual basis adequate to support a good faith belief by a reasonable person' . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* (quoting *Caldwell v. District Court,* 664 P.2d 26, 33 (Colo. 1982)). Apparently, no such showing was made in this case because Attorney Koditek so quickly succumbed to the prosecutor's questioning. Under *Zolin,* a prosecutor may not obtain disclosure, or even judicial review, of the privileged information upon a simple assertion that the crime-fraud exception applies, as happened before the grand jury here. *See id.* at 571.

Nevertheless, Edgar ultimately had the benefit of that third line of defense. On the facts of this case we see no prejudice, and therefore no basis to vacate the conviction. *See* Fed. R. Crim. P. 52; *Bank of Nova Scotia,* 487 U.S. at 254-55 (requiring prejudice). Edgar does not now assert that the trial testimony by Koditek invaded his privilege. The district court instructed the prosecutor to limit his questions to what was disclosed to insurance company and to avoid the communications between Edgar and Attorney Koditek. On the significant point as to whether Edgar had or had not confided to Koditek that the tax returns to be provided to Commercial Union had not been filed with the IRS, Attorney Koditek did not so testify at trial, as he had to the grand jury. Instead, the evidence that the tax returns had not been filed was introduced independently through a Certification of Lack of Record from the custodian of federal tax returns. On the point that Edgar provided the tax returns to Attorney Koditek, Edgar does not claim on appeal that the trial court erred in holding that information was not privileged.

Edgar argues there was prejudice in that he was deprived of the choice as to whether to assert an advice of counsel defense. Edgar chose not to assert that the false tax returns were prepared and submitted on advice of counsel. He was free to have made such an argument, if supported, at trial, whatever Koditek's grand jury testimony. Had he made such an argument, of course, he would have waived any claim that the attorney-client privilege protected those discussions. *See Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 486-87 (3d Cir. 1995); *Saint-Gobain/ Norton Indus. v. General Elec. Co.,* 884 F. Supp. 31, 33 (D. Mass. 1995). Moreover, there was no argument or evidence that Koditek's actions in connection with the demand letter were not authorized. The choice as to whether to make such arguments was not foreclosed to him and was a strategy choice by trial counsel.

Nor is this a fruit-of-the-poisonous-tree situation that would require suppression of evidence or quashing the indictment. *Cf. Rogers,* 751 F.2d at 1078-79. Edgar has not convinced us that he would not have been indicted but for his attorney's testimony. Edgar argues that the only reason the government knew that Attorney Koditek obtained the tax returns from Edgar was because of Koditek's grand jury testimony. However, that inference was self-evident. Further, the Koditek letter and attached returns came from Commercial Union's claim file and there was independent evidence identifying the signature on the unfiled tax returns as Edgar's. There being no prejudice, there was no reversible error. Fed. R. Crim. P. 52.

Sufficiency of Evidence of Materiality

In his *reply* brief[15] in this court Edgar makes the argument

15. Edgar filed a motion with this court for leave to present a claim under (Cont'd)

for the first time that the jury was not permitted to decide the issue of materiality of his allegedly false statements, in violation of the principles announced by the Supreme Court in *United States v. Gaudin,* 115 S. Ct. 2310 (1995). *Gaudin* was decided after his trial but before his appeal. The issue, not having been raised in his principal brief to this court, is waived. *See United States v. Gabriele,* 63 F.3d 61, 67 n.9 (1st Cir. 1995); *United States v. DeMasi,* 40 F.3d 1306, 1318 n.12 (1st Cir. 1994), *cert. denied,* 115 S. Ct. 947 (1995); *United States v. Brennan,* 994 F.2d 918, 922 n.7 (1st Cir. 1993). Had Edgar raised the *Gaudin* issue initially on appeal, this court would review the failure to submit materiality to the jury under the plain error test because Edgar also failed to raise the issue in the district court. *See Randazzo,* __ F.3d at __, No. 95-1489, slip op. at 17; *see also United States v. Collins,* 60 F.3d 4, 8 (1st Cir. 1995). Edgar argues that we should nonetheless review the district court's failure to submit the element of materiality to the jury for "plain error" just as though the issue were raised in his initial brief. *See Randazzo,* __ F.3d at __, No. 95-1489, slip op. at 17. However, we think a higher standard must be met, and as review for "plain error" lies "within the sound discretion of the Court of Appeals," we decline to apply that standard in the circumstances of this case.[16] *See United States,* 113 S. Ct. 1770, 1779 (1993); Fed. R. Crim. P. 52(b); *Taylor,* 54 F.3d at 972 ("appellate courts will noitce unpreserved errors only in the most egregious circumstances").

(Cont'd)

United States v. Gaudin, 115 S. Ct. 2310 (1995), in his reply brief. The motion was granted, "without prejudice, however, to the government's right to argue, or the court's right to conclude, that the issue ha[d] been waived."

16. Even if we were to apply the plain error test, we would find Edgar had not met his burden. In light of the very strong evidence of guilt, we do not think there was a "miscarriage of justice" that would warrant correction of any error. *United States v. Olano,* 113 S. Ct. 1770, 1779 (1993).

Edgar did properly preserve an objection to the sufficiency of the evidence on materiality, but that we also reject. Edgar argues that the evidence was insufficient to establish that his omissions from the forms CA-8 for which he was convicted were material. A statement is material if it has a natural tendency to influence or is capable of affecting or influencing a government function. *United States v. Arcadipane,* 41 F.3d 1, 7-8 (1st Cir. 1994). Edgar argues that because the decision not to grant him benefits had already been made and because the forms were filed late, his failure to set forth his self-employment was not material. However, the standard is not whether there was actual influence, but whether it would have a tendency to influence. The district director for the OWCP testified that on a claim for disability, whether one may work or has worked has considerable influence on the amount of benefits warranted. Thus, the district court did not err in finding Edgar's false statements to be material. *See id.* (affirming a finding of materiality for false statements of employment on a Form 1032).

Fair Credit Reporting Act

Edgar's last claim of error is that there was ar abuse of discretion in the denial of his motion for discovery of the government's compliance with the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t. Edgar claimed to have needed this information in order to determine whether a motion to dismiss the indictment or a motion to suppress evidence was warranted. Even assuming that the government violated the FCRA by improperly acquiring data concerning Edgar's finances, Edgar has not shown how any use of the acquired information could have prejudiced him in the grand jury to support dismissal of the indictment. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Nor would suppression be required for a

violation of the FCRA. Suppression of the evidence is not a mentioned remedy under the FCRA, nor is discovery of whether the government complied with the Act. *See* 15 U.S.C. § 1681n; *cf. United States v. Kington*, 801 F.2d 733, 737 (5th Cir. 1986) (refusing to suppress records obtained in violation of the Right to Financial Privacy Act when Congress did not provide for that remedy in statute), *cert. denied*, 481 U.S. 1014 (1987); *cf. also United States v. Payner*, 447 U.S. 727, 735 (1980) (evidence otherwise admissible may not be suppressed on the ground that it was seized unlawfully from a third party); *United States v. Caceres*, 440 U.S. 741 (1979) (evidence obtained in violation of IRS regulation need not be suppressed). There was thus no denial of the motion.

Affirmed.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED APRIL 19, 1996

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-1190

UNITED STATES

Appellee

v.

CHARLES MARTIN EDGAR

Defendant - Appellant

JUDGMENT

Entered: April 19, 1996

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

By s/ WILLIAM H. NG
William H. Ng, Clerk

cc: Frances L. Robinson, Esq.
James C. Rehnquist, Esq.

APPENDIX C — ERRATA SHEET

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 95-1190

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES MARTIN EDGAR,

Defendant, Appellant.

ERRATA SHEET

The opinion of this Court issued on April 19, 1996, is amended as follows:

On page 19, delete footnote 9 in its entirety.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED OCTOBER 24, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.: 93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

DEFENDANT'S REQUEST FOR A HEARING AS TO EVIDENCE DERIVED FROM THE ILLEGAL USE OF THE TESTIMONY OF ROBERT KODITEK, ESQ. BEFORE THE GRAND JURY

* * *

[Handwritten]

10-24-94
Denied
Edward F. Harrington, D.J.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED OCTOBER 17, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.: 93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR ILLEGAL USE OF THE TESTIMONY OF ROBERT KODITEK

* * *

[Handwritten]

10-17-94
Motion denied
Edward F. Harrington, D.J.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED OCTOBER 17, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.: 93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

DEFENDANT'S MOTION IN LIMINE FOR COMPLIANCE WITH THE PROCEDURES SET FORTH IN UNITED STATES V. ZOLIN IN REGARD TO THE TESTIMONY OF ROBERT KODITEK, ESQ.

* * *

[Handwritten]

10-17-94
Motion denied. Privilege does not apply.
Edward F. Harrington, D.J.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED OCTOBER 17, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.: 93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

MOTION FOR LEAVE TO FILE GRAND JURY TESTIMONY OF ROBERT KODITEK UNDER SEAL

* * *

[Handwritten]

10-17-94
Motion allowed
Edward F. Harrington, D.J.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED DECEMBER 20, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.: 93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

DEFENDANT'S MOTION FOR RECONSIDERATION OF MAGISTRATE'S DENIAL OF DEFENDANT'S MOTION FOR DISCOVERY OF COMPLIANCE WITH LOCAL RULE 83.6(4)(B) OF THE RULES OF THE DISTRICT COURT

* * *

[Handwritten]

12-20-93
Motion denied
Edward F. Harrington, D.J.

APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED NOVEMBER 30, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO.
93-10250-H

UNITED STATES OF AMERICA,

v.

CHARLES MARTIN EDGAR

ORDER
ON
PRETRIAL DISCOVERY MOTIONS

November 30, 1993

ALEXANDER, M.J.

In accord with the letter dated October 4, 1993 to the Court, this Court hereby rules as follows:

1. Motion for Leave to File Additional Motion (#9) resolved by the parties.

2. Motion for Disclosure of Bad Acts (#10) resolved as to Section I; Denied as to Section II.

3. Motion for a List of Government Witnesses (#11) resolved by the parties.

Appendix I

4. Motion for Statements of Defendant (#12) resolved; Denied as to statements made to third-parties.

5. Motion for Preservation of Notes, Memoranda, Statements, Recordings or Other Documents (#13) resolved.

6. Motion to Interview Prospective Government Witnesses (#14) resolved.

7. Motion for Disclosure of Experts (#15) resolved.

8. Motion for Discovery (#16) Resolved. Denied as to ¶ 5 to third-parties. Denied as to ¶ 6 unless to be introduced at trial or exculpatory.

9. Motion for Jencks Act Material (#17) resolved.

10. Motion for Production of Government Interview Reports and Grand Jury Testimony (#18) Denied.

11. Motion for Disclosure of Names and Addresses of Informants (#19) resolved.

12. Motion for Disclosure of Exculpatory Evidence (#20) resolved excepting ¶ 8 which is Denied. Paragraphs 23, 24 and 26 Allowed pursuant to *Brady*.

13. Motion for Discovery of Compliance with Fair Credit Reporting Act (#21) Denied pursuant to *United States v. Vest*.

14. Motion to Dismiss (#22) is Reserved for the District Judge.

Appendix 1

15. Motion for Discovery of Compliance with Local Rule 83.6(4)(B) (#24) Denied.

16. Motion for Grand Jury Testimony (#25) Denied.

17. Motion for Severance (#26) is Reserved for the District Judge.

18. Motion for Relief from Prejudicial Joinder (#27) is Reserved for the District Judge.

19. Motion for Copies of Transcripts (#29) resolved.

20. Motion to Dismiss (#33) is Reserved for the District Judge.

21. Motion to be Furnished with Criminal Records (#30) resolved.

22. Request for Oral Argument (#31) Allowed.

23. Motion for Leave to Substitute Corrected Motions (#34) is Allowed.

24. Dispositive Motions (#35, #36, and #38) are reserved for the District Judge.

SO ORDERED.

s/ Joyce London Alexander
JOYCE LONDON ALEXANDER
UNITED STATES MAGISTRATE JUDGE

APPENDIX J — RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix J

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Local Rule 83.6(4)

(4) Standards for Professional Conduct.

(A) For misconduct defined in these rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

(B) Acts or omissions by an attorney admitted to practice before this court pursuant to this Rule 83.6, or appearing and practicing before this court pursuant to Rule 83.7, individually or in concert with any other person or persons, that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts, embodied in Rules 3:05, 3:07 and 3:08 of said court, as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth.

Appendix J

RULES OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court Rule 3:07 Canons of Ethics

DISCIPLINARY RULES

DR 4-101. Preservation of Confidences and Secrets of a Client

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

(E) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized non-profit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a lawyer assistance program may, pursuant to the provisions of DR 4-101(D), require a person acting under the lawyer's supervision

or control to sign a non-disclosure form approved by the Supreme Judicial Court.

Amended effective Nov. 15, 1995

SUPREME JUDICIAL COURT RULE 3:08 PROSECUTION AND DEFENCE STANDARDS

PF 15. Subpoena of Defense Attorney

It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness.

Adopted effective January 1, 1986.